

**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

Case No.: 2017-OFC-00004

**DEFENDANT'S BRIEF REGARDING THE AUTHORITY OF THIS COURT TO
NARROW OFCCP'S SUBJECT DEMANDS**

RECEIVED

MAR 08 2017

**Office of Administrative Law Judges
San Francisco, Ca**

PRELIMINARY STATEMENT

In its February 27, 2017 Order Resetting Hearing and re Additional Briefs, the Court requested that the parties brief the following question: does the Administrative Law Judge (“ALJ”) have an option to narrow OFCCP’s demands for data/information that are the subject of this proceeding (the “Subject Demands”) and order Google to comply with the Subject Demands as narrowed?

Yes, for five reasons. *First*, OFCCP’s regulations do not limit this Court’s power to fashion relief, and are silent on the issue with respect to modifying subpoenas. *Second*, the Federal Rules of Civil Procedure, which apply if the OFCCP’s regulations are silent, empower the Court to modify subpoenas, and OFCCP’s demand on Google is an administrative subpoena. *Third*, the Office of Administrative Law Judge’s Rules of Practice and Procedure also provide the Court the power to modify subpoenas. *Fourth*, courts do modify agency subpoenas, including in administrative subpoena employment cases. *Lastly*, the Administrative Procedure Act gives the Court the power to issue injunctive relief.

As set forth in detail in Defendant’s Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion for Summary Judgment, OFCCP’s Subject Demands are not sufficiently limited in scope, not reasonable in purpose, and/or are unduly burdensome in several respects, and, therefore, violate the Fourth Amendment of the United States Constitution. OFCCP has failed to meet its burden of proof with respect to these standards, and, therefore, its denial of access claim should be dismissed in its entirety. Nevertheless, in the event justice demands an alternative to complete dismissal, this Court has the authority to narrow the Agency’s Subject Demands, and enforce them as modified.

DISCUSSION

A. OFCCP Regulations Give the Court Flexible and Broad Authority to Recommend the Narrowing of the Subject Demands.

OFCCP's regulations do not limit the ALJ's authority to fashion a remedy in this matter and are silent on the issue of modification of a subpoena. Specifically, nothing in 41 C.F.R. § 60-30.1 *et seq.* precludes the Court from issuing an order narrowing the Subject Demands.

Here, Google argues that the Subject Demands, in their present form, violate the Fourth Amendment or are otherwise invalid. The Fourth Amendment's overall command is that government searches be reasonable, an issue analyzed by determining if the Subject Demands are sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. *United Space Alliance v. Solis*, 824 F. Supp. 2d 68, 90-91 (D.D.C. 2011). OFCCP has offered no legitimate basis for why the Subject Demands satisfy this constitutionally mandated criteria. Given the Fourth Amendment's emphasis on reasonableness, a modification of the Subject Demands that excises the portions of the Agency's requests that do not comport with these standards qualifies as an appropriate remedy in this matter.

B. The Federal Rules of Civil Procedure Empower the Court to Modify the Subject Demands.

OFCCP regulations, 41 C.F.R. § 60-30.1 *et seq.*, govern an ALJ's authority in OFCCP proceedings before the Department of Labor. 41 C.F.R. § 60-30.1 ("This part provides the rules of practice for all administrative proceedings, instituted by the OFCCP . . ."). When the OFCCP regulations do not have a specific provision on an issue, "procedures shall be in accordance with the Federal Rules of Civil Procedure." *Id.* This is logical, because ALJs are

“functionally comparable” to U.S. district judges, who are governed by the Federal Rules of Civil Procedure. *Butz v. Economou*, 438 U.S. 478, 513 (1978) (stating that an ALJ’s “powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions”).

Accordingly, this Court is empowered by the Federal Rules of Civil Procedure to “modify a subpoena” under certain circumstances. Fed. R. Civ. P. 45(d)(3). Whether to modify a subpoena “is a case specific inquiry that turns on such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.” *American Elec. Power Co. v. United States*, 191 F.R.D. 132, 136 (S.D. Ohio 1999) (internal quotation marks omitted). As both parties and the Court have noted, the Subject Demands constitute administrative subpoenas. *United Space Alliance*, 824 F. Supp. 2d at 92. Accordingly, Federal Rule of Civil Procedure 45, in addition to the OFCCP regulations, provides this Court the authority to modify the Subject Demands.

C. The Office of ALJs Rules of Practice and Procedure Empower ALJs to Modify Agency Demands.

The Department of Labor’s Office of ALJs Rules of Practice and Procedure at 29 C.F.R. § 18.56(c)(3) tracks Federal Rule of Civil Procedure 45 in providing ALJs the same authority to modify subpoenas. 29 C.F.R. § 18.56(c)(3) (using language similar to Federal Rule of Civil Procedure 45(d)(3)). Thus, even if the Court were not satisfied that OFCCP regulations and the Federal Rules of Civil Procedure provide such power, the Office of ALJs Rules of Practice and Procedure permit this Court to narrow OFCCP’s demands.

D. Courts Narrow Subpoenas, including in Administrative Agency Matters.

If this Court excises unreasonable or invalid portions out of OFCCP's demand on Google, it will be in good company. For example, the court in *E.E.O.C. v. McLane Co.*, No. CV-12-615-PHX-GMS, 2012 U.S. Dist. LEXIS 47443 (D. Ariz. Apr. 4, 2012), ruled that an administrative subpoena was unreasonable under the Fourth Amendment, and narrowed the subpoena's scope accordingly.¹ In *McLane*, an employee alleged that she had been discriminated against on the basis of gender because she had been forced to take a physical strength test after returning from maternity leave. *Id.* at *2. The EEOC requested that the employer provide several categories of information as part of an investigation into potential sex and age discrimination: "pedigree information" (the names, dates of birth, social security number, and contact information for all people who took the strength test), the reason each person took the strength test, their score, and any adverse action that resulted because of the test score. *Id.* at *2-3.

McLane ruled some of the agency's requests were unreasonable. *Id.* at *16-17. For example, the EEOC failed to show the test takers' names, contact information, and other personal information were relevant to the agency's investigation. *Id.* at *14-16. *McLane* also found portions of the EEOC's requests overbroad, because the agency asked for the names and contact information of people who were too young to have suffered the alleged discrimination. *Id.* at *16-17. And, the court concluded the EEOC's request for information on whether taking the test caused adverse actions was unduly burdensome, because compiling such information would have required the employer's HR employees to manually evaluate thousands of paper records. *Id.* at *17-18. Rather than invalidate outright the EEOC's request to have its administrative

¹ In its motion for summary judgment, OFCCP relied on *E.E.O.C. v. McLane Co.*, No. CV-12-615-PHX-GMS, 2012 U.S. Dist. LEXIS 47443 (D. Ariz. Apr. 4, 2012). (OFCCP MSJ at 21-22.)

subpoena enforced, *McLane* narrowed the subpoena and then enforced what remained. *Id.* at *20-22 (ruling that the employer did not have to comply with portions of the subpoena the court deemed to violate the Fourth Amendment). *See also Sec'y of Labor v. Kazu Constr., LLC*, No. 16-00077 ACK-KSC, 2017 U.S. Dist. LEXIS 21600, *31-32 (D. Haw. Feb. 15, 2017) (“To assuage concerns of overbreadth and undue burden, and to promote proportionality, the Court modifies the subpoenas” by narrowing the requests.).

NLRB v. Brown Transport Corp., 620 F. Supp. 648 (N.D. Ill. 1985), also supports Google’s position. There, the NLRB subpoenaed an employer’s documents relating to alleged unfair business practices. *Id.* at 649-50. An ALJ heard the employer’s motion to quash the subpoena, in which the company argued the subpoena was overbroad, not sufficiently limited, and sought irrelevant documents. *Id.* at 650. The ALJ “granted the petition to quash as to portions of the Subpoena but refused to revoke the Subpoena entirely.” *Id.* The district court upheld the ALJ’s decision to narrow the subpoena. *Id.* at 654. Like *McLane*, *Brown* demonstrates that ALJs are empowered to narrow an agency’s request for documents, and enforce what survives of the demands.

E. The Administrative Procedure Act Gives the Court the Power and Discretion to Narrow the Subject Demands.

An order from this Court that narrows the Subject Demands would be injunctive or equitable in nature. The Administrative Procedure Act (“APA”), which governs federal agency adjudications, *see* 5 U.S.C. § 554, is another source of the Court’s power to narrow the scope of OFCCP’s subpoena.

Under the APA, an ALJ, in his or her “discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.” *See* 5 U.S.C. § 554(e). For purposes of the

APA, an “order” is defined as “the whole or a part of a final disposition, whether affirmative, negative, *injunctive*, or declaratory in form, of an agency in a matter.” 5 U.S.C. § 551(6) (emphasis added). Importantly, nothing in section 554(e) says an ALJ may not modify an agency demand for records and information, and the statute instead leaves the order to the Court’s discretion. Accordingly, the Court’s power under the APA includes the ability to issue an order narrowing OFCCP’s demand on Google, and to enforce the modified demand accordingly. *See* 5 U.S.C. § 554(e).

CONCLUSION

As set forth in detail in Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, OFCCP cannot meet its burden of proof with respect to the standards required for the issuance of an administrative subpoena. Accordingly, Plaintiff's denial of access claim should be dismissed in its entirety either after the hearing, or, if the Court deems appropriate, by granting summary judgment to Defendant. However, if the Court determines that some portion of the Subject Demands are sufficiently limited, relevant in purpose, and/or are not unreasonably burdensome, or are otherwise lawful, the Court is empowered to narrow the Subject Demands, and enforce them as modified.

Respectfully submitted,

Dated: March 3, 2017

JACKSON LEWIS P.C.
ATTORNEYS FOR DEFENDANT
GOOGLE INC.

50 California Street, Floor 9
San Francisco CA 94111
Telephone (415) 394-9400
Facsimile (415) 394-9401

By:



LISA BARNETT SWEEN, ESQ.
MATTHEW J. CAMARDELLA, ESQ.
DANIEL V. DUFF, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2017, I caused a true and correct copy of the foregoing **Defendant's Brief Regarding the Authority of this Court to Narrow OFCCP's Subject Demands** to be served by sending a copy of same via U.S. Mail and e-mail to:

Ian Eliasoph, Esq.
Counsel for Civil Rights
Office of the Solicitor
U.S. Department of Labor
90 7th Street, Suite 3-700
San Francisco, CA 94103
Eliasoph.Ian@dol.gov

Marc A. Pilotin, Esq.
Office of the Solicitor
U.S. Department of Labor
90 7th Street, Suite 3-700
San Francisco, CA 94103
Pilotin.Marc.A@dol.gov



LISA BARNETT SWEEN, ESQ.